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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1445

ELVIN LEE BYNUM, JOSEPH CORDOVANO, ABRAHAM WRIGHT, LANCE SMALL, NEWBRY MITCHELL, FANNIE MAE GARNETT, JACQUELINE FULLER DYSON, JOHN CONIGLIO, ANGELO MELI, VINCENT ALTAMURA, IRVING BIRNBAUM, CHARLES TUZZOLINO, and LEVIS NEDD,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Elvin Lee Bynum, Joseph Cordovano, Abraham Wright, Lance Small, Newbry Mitchell, Fannie Mae Garnett, Jacqueline Fuller Dyson, John Coniglio, Angelo Meli, Vincent Altamura, Irving Birnbaum, Charles Tuzzolino and Levis Nedd pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 26, 1975, which affirmed judgments of conviction previously entered against each of the Petitioners in the United States District Court for the Southern District of New York.

Opinions Below

Following the entry of judgments of conviction in the District Court, the Petitioners appealed to the Court of Appeals. On March 14, 1973, while retaining jurisdiction of the case, the Court of Appeals remanded the case to the District Court, as to all Petitioners, for an evidentiary hearing as to the statutory and constitutional propriety of the manner in which electronic surveillance was executed during the investigatory stage of the case, *United States* v. *Bynum,* 475 F.2d 832 (2d Cir., 1973) [*Bynum I*]. The opinion is reproduced as Appendix A of the Petitioners' Appendix which is filed with this Petition (1a-11a).[1]

[1] The following abbreviations are used in the Petition:

"-a"—is a reference to the Petitioners' Appendix which is separately bound and filed with this Petition. The Appendix contains the three opinions of the Court of Appeals (Appendices A, C and J, respectively), the two opinions of the District Court (Appendices B and I, respectively), the Court of Appeals' Orders denying Rehearing (Appendices D, E and K, respectively), the Remand Orders of this Court (Appendix G) and of the Court of Appeals (Appendix H), and the electronic surveillance provisions of Title 18, United States Code, 18 U.S.C. §§ 2510-2520 (Appendix F).

Where appropriate, the three opinions of the Court of Appeals will be referred to as *"Bynum I"*, *"Bynum II"* and *"Bynum III"*, respectively.

"T-"—is a reference to the seven volumes of trial testimony and exhibits which constituted the Appellants' Appendix in the Court of Appeals upon the initial appeal. These volumes will be certified to this Court.

"H-"—is a reference to the four volumes of *hearing* testimony and exhibits which resulted from the evidentiary hearing as to electronic surveillance which was conducted in the District Court pursuant to the direction of the Court of Appeals in *Bynum I*. These volumes will be certified to this Court.

Following the evidentiary hearing, which had been mandated by the Court of Appeals, the District Court issued its findings and opinion, *United States* v. *Bynum,* 360 F. Supp. 400 (S.D.N.Y., 1973), which is set forth in the Petitioners' Appendix as Appendix B (12a-49a). The Court of Appeals thereafter affirmed the judgments of conviction as to all Petitioners, *United States* v. *Bynum* [*Bynum II*], 485 F.2d 490. That opinion is set forth as Appendix C in the Petitioners' Appendix (50a-75a).

Rehearing (Appendix D [76a-77a]), and rehearing *in banc* (Appendix E [78a-79a]) were denied.

On May 28, 1974, this Court granted certiorari as to all Petitioners, vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *United States* v. *Giordano,* 416 U.S. —. (*United States* v. *Bynum,* 416 U.S. 903). The memorandum decision of this Court is reproduced in the Petitioners' Appendix at Appendix "G" (108a). Thereafter, upon motion of the Government, the Court of Appeals remanded the case to the District Court for further consideration in light of *United States* v. *Giordano, supra* (Appendix "H" [109a-110a]).

Following an evidentiary hearing, the District Court issued its opinion, findings and conclusions, holding that no suppression of wiretap evidence was required, *United States* v. *Bynum,* 386 F. Supp. 449 (S.D.N.Y., 1975). The opinion of the District Court is set forth in the Petitioner's Appendix "I" (110a-135a). The Court of Appeals affirmed in an opinion, *United States* v. *Bynum,* — F.2d — (March 26, 1975) [*Bynum III*]. The opinion of the Court of Appeals is set forth in the Petitioners' Appendix as Appendix "J" (137a-140a), and the amended order of the Court of Appeals denying rehearing (April 25, 1975), is set forth as Appendix "K" (142a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the search and seizure provisions of the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution, which are as follows:

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

This case also involves 18 U.S.C. §§ 2510-2520, inclusive (interception of wire or oral communications). These statutory provisions are set forth in full as Appendix F in the Petitioners' Appendix (80a-107a).

Questions Presented for Review

During the period from January 29, 1971 through March 3, 1971, the government sought, obtained and executed two federal court orders and one extension order for the wiretapping of two telephones utilized by various of the Petitioners. Government agents recorded every communication or attempted communication which passed over those telephones during the effective period of the wiretap orders. The total number of such communications or attempted communications were 3,436. In *Bynum III,* the Court of Appeals held that the extension order was unlawfully authorized, but that the use in evidence of conversations derived therefrom was harmless error (138a-140a).

The following questions were passed upon by the Court of Appeals and are presented for review by this Court:

1. Where the Court of Appeals has held that an extension of an existing wiretap order was unlawfully authorized, and that certain of the petitioners had standing to object to the use of telephone conversations which were secured by virtue of that extension order, did the Court of Appeals improperly conclude that such use was "harmless error"? Where such conversations were actually placed in evidence before the trial jury, and relied upon by the Government as being corroborative, must it not be concluded that the defendants were prejudiced? As to hundreds of conversations seized but not used in evidence, did the Court of Appeals wrongfully reach its conclusion of "harmless error" since it did not consider what, if any, value those additional conversations had been in the investigatory and prosecutorial stages of the case?

2. Did the Court of Appeals erroneously conclude that certain of the petitioners lacked standing to object to the wiretap evidence, merely because their conversations were not directly used in evidence at trial?

3. In view of the other excellent sources of information available to and utilized by the government in this case, did the wiretap orders violate the provisions of 18 U.S.C. § 2518(1)(c) and (3)(c), which prohibit electronic surveillance in the absence of a showing that "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous"?

4. Did the Government fail to minimize the interception of irrelevant and privileged communications in violation of 18 U.S.C. § 2518(5)? If there is allowed, as to each intercepted conversation, a two minute period so that the

overhearing agent may orient himself to the participants in and nature of an intercepted conversation, is it additionally permissible for the agent to continue interception of every conversation to its conclusion predicated upon the possibility that even an innocent conversation may yield a clue or a fact which may be helpful to the investigation?

5. In the event that the questions set forth *supra* may validly be determined in favor of the government as a matter of statutory construction, were the procedures followed nevertheless violative of the search and seizure provision of the Fourth Amendment?

Statement of the Case [2]

Following a lengthy trial, judgments were entered against the various Petitioners in the United States District Court for the Southern District of New York, convicting them upon one count of conspiracy to obtain and sell narcotics in violation of 21 U.S.C. §§ 173 and 174, and 21 U.S.C. §§ 4705(a) and 7237(b). The Petitioner Nedd was, additionally, convicted of unlawfully carrying a firearm in the commission of the conspiracy, in violation of 18 U.S.C. § 924. Each of the Petitioners received substantial prison sentences.[3]

1. The Alleged Conspiracy

The substance of the Government's case is set forth in *Bynum II*, at 52a-57a, and we shall repeat only so much of it here as is necessary to place the electronic surveillance within a factual context.

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[2] A key to the abbreviatitons used in this Petition is set forth in footnote 1, *supra*, at p. 2.

[3] The sentences imposed upon the various Petitioners ranged from five to thirty years imprisonment, and certain of the petitioners were, additionally, fined. The specific sentences imposed are set forth in *Bynum I* at 3a, fn. 1.

The Government sought to establish a conspiracy which extended from January, 1970 to April, 1971. The substance of the charge was that the conspirators (the Petitioners herein and certain others) sold and purchased cocaine and heroin to and from each other for ultimate sale to third parties.

The Government's proof relied primarily upon the testimony of George Stewart, an alleged participant in most of the conspiratorial events. In December, 1970, in the midst of the alleged conspiracy, and following a series of arrests, he agreed to become an undercover informant for the government. He thereafter reported on a day-to-day basis concerning the activities of the other alleged conspirators. He also gave the agents samples of narcotics, narcotics paraphernalia, and a view of a substantial amount of money intended for the purchase of narcotics.

In addition to Stewart's daily reporting, the government engaged in visual and electronic surveillance of the various alleged conspirators.

The electronic surveillance took two forms:

As part of his collaboration with the government, Stewart tape recorded ten of his telephone conversations with certain of the Petitioners;

Additionally, during the period from the end of January, 1971, through the beginning of March, 1971, pursuant to a court order, Federal agents tapped two telephones used by various of the Petitioners, particularly Bynum and Garnett. As a result, thousands of telephone conversations were overheard and recorded. Of these, eight were received in evidence at the trial. Six of these were between Bynum and Cordovano and two were between Bynum and Stewart. The Government claimed that all of these conversations corroborated Stewart's version of events (Gov. Exs. 1-4, 8, 13-15; T. 3193-3202, 3208, 3223-3227).

With Stewart's cooperation, Government agents were able to observe various meetings between Stewart and other Petitioners, as well as between other Petitioners. The agents were thus able to corroborate the fact, but not the purpose, of such meetings.

Following his own indictment, one of the alleged conspirators, Charles Moody, was recruited as a government witness. He corroborated Stewart's testimony concerning one of the many transactions recounted by Stewart. That transaction allegedly involved an unconsummated sale of narcotics by Moody and the Petitioners Birnbaum and Feroldi to Stewart and the Petitioner Cordovano.

Moody also testified concerning one of three sub-plots which the government successfully argued were part of the larger conspiracy charged by the indictment. He claimed that he, and the Petitioners Cordovano and Bynum and one Feroldi,[3a] planned the unconsummated robbery of a Washington, D.C. liquor store for the purpose of obtaining cash and/or narcotics which were allegedly stored there.

The second sub-plot involved a similar robbery attempt to obtain monies and/or narcotics from an individual in Manhattan. This aspect of the proof was dependent upon the testimony of Stewart, who inculpated Petitioners Bynum, Cordovano and Nedd.[4] Stewart's testimony was partially corroborated by the robbery victim, who attested that such a robbery had occurred and that he recognized Petitioner Nedd as being one of the robbers.

The third sub-plot, also dependent for its proof upon Stewart's testimony, involved an alleged plan to murder one Robert Wollack, who, at the time, was thought to be a government informer.

[3a] John Feroldi was a defendant at trial, but is not a party to this petition.

[4] At the end of the government's case, the Court dismissed charges against Michael Lebbers, one of the alleged participants in this robbery plot.

2. The Wiretaps

A. The Sequence of Events

A concise summary of the history of the wiretaps is found in the following excerpt from *Bynum II*:

> "The Government was authorized by District Judge Anthony J. Travia, Eastern District of New York, on January 29, 1971 to overhear and electronically record telephone conversations at the home of the defendant Garnett, Bynum's girlfriend; her home was the site of subsequent meetings and cutting operations of the defendants. The order was based on an affidavit stating that four reliable informants had indicated that Bynum was engaged in a large drug distribution business and used Garnett's phone in this business. The affidavit further recited that Bynum had corrupted state and federal officers, that he had a previous narcotics conviction, and that he was reputed to have caused the killing of some 18 people. The order authorized the wiretap for 20 days and contained the statutory directive (18 U.S.C. § 2518(5)) that the interception of communications be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.[5] On February 12, 1971, a second wiretap[6] was authorized on another phone in the Garnett residence for 20 days duration.[7] The tap on the first phone was extended by Judge Travia on February 18, 1971 until March 3, 1971 so that it ex-

---

[5] The agents called this the "W" tap.

[6] The agents called this the "Q" tap.

[7] [This footnote is part of the original text of the opinion]:

> Bynum learned of the first proposed wiretap *before* Judge Travia signed the authorization. He had the second phone installed and the agents learned of this through their tap on the first phone.

pired on the same day as the second tap.[7a] For five weeks these phones were monitored and conversations were recorded, eight of which were introduced at the trial and played for the jury" (65a-66a).

B. The Wiretap Applications and Orders

(*i*) *Necessity.* Each of the wiretap applications alleged that "normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used" (H. 613, 647, 688). The affidavit annexed to the first application belied this assertion (H. 617-630). At substantial length it set forth information concerning Bynum and his alleged operations known personally to the investigating agents. Additionally, it detailed current and recent information supplied to the government by informants who had, or were then engaged in, personal transactions with Bynum concerning each of the matters under investigation, and who were intimately connected with his alleged operation.

(*ii*) *The Target.* Although the wealth of information described, *supra,* was known to the Government at the time of the first application, all of the applications and all of the orders described the target of investigation in such terms as "Elvin Lee Bynum and others unknown" (e.g., H. 603, 611-12). Neither of the documents identified any of the other targets by name, although the conversations of many of them were intercepted.

(*iii*) *The Minimization Requirement.* The first and second wiretap orders each contained a provision that ". . . this authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not

[7a] In *Bynum III,* the Court of Appeals held the extension tap to have been unlawful since it had not been authorized by the Attorney General of the United States (138a-140a).

otherwise subject to interception under Chapter 119 of Title 18, United States Code . . ." (H. 607, 642). The third order (i.e., the extension of the first order) did not contain such a provision (H. 681-4).

As each application was presented to the issuing judge, and on various other occasions, he engaged in unrecorded conversations with Mr. Updike, the supervising attorney who had signed the various applications.

It was Mr. Updike's hearing testimony that "there was no explicit discussion of the issue of minimization . . ." with Judge Travia (H. 166). Indeed, Updike's testimony included the following responses:

> "I don't think I ever used in a conversation with Judge Travia the word minimization" (H. 323).
>
> * * * * *
>
> "Q. And as a matter of fact you never went back and asked Judge Travia to modify the minimization requirement? A. No, sir, I didn't.
>
> "Q. And you never went back and asked him to eliminate the minimization requirement, did you? A. No, sir.
>
> "Q. And you never went back and sought his counsel on how to meet the minimization problem, did you? A. No, not expressly.
>
> * * * * *
>
> "Q. As a matter of fact, during that period of time, you never once discussed with him the problem of how you can meet the minimization requirement, isn't that right, Mr. Updike? A. That's correct" (H. 324-327).

On the other hand, Judge Travia's recollection was that "I wanted to make sure that they [the agents] were aware

of the minimization rule, and all the other things * * *" (H. 411). He further testified:

> ". . . I was constantly in touch with them to make sure that they complied with certain provisions of the order, particularly the minimization rule.
>
> "In other words, I wouldn't want them to be on an open phone for every conversation possible if they could comply with the minimization requirements of the order, and it was during that surveillance by me that I would be talking to Mr. Updike and to the agents and there were a number of times — this didn't involve one, two or three" (H. 409-410).
>
> * * * * *
>
> "Q. Did you admonish them that they should minimize this recording of conversations? A. I don't know whether I ever used admonished, but I would, in talking to them about this, tell them to be very careful with respect to this particular part of the order, because I think that is a very important part of the order—minimization—and I would make sure that they were not just promiscuously listening to or recording everything that goes on but when it became such a far flung situation, involved so many people, and this we knew right away practically, then I had to admonish them, if you want me to use that word, to be careful and to use good judgment and good discretion and you just can't, when you are in such a situation say, you turn it on and off. You don't know what is going to happen, and there are certain situations where you have to give a little latitude and in this case from what I heard I had to give latitude.
>
> "Q. Now, as distinguished from recording of conversations, there was the earphone mechanism they could also listen on. A. They wouldn't be able to know what is on the recording until they read it or heard it back but on the listening device they could hear it right then and there.
>
> "Q. Did you admonish them that they should attempt to minimize their contemporaneous listening? A. I think that involves the whole thing. When we are talking about minimization, I think it involved everything. In fact, listening more than recording, or both. To me they are both equally as important. One follows the others. That's all" (H. 441-442).

(*iv*) *The Reporting Requirement.* Each of the wiretap orders directed that "Charles B. Updike shall furnish the Court with a report [at five day intervals] following the date of this order showing [1] what progress has been made toward achievement of the authorized objective and [2] the need for continued interception" (H. 607, 642, 684).

In fact, reports bearing the following dates were filed by Mr. Updike:

February 4, 1971 (H. 634)
February 8, 1971 (H. 636)
February 16, 1971 (H. 676)
February 18, 1971 (H. 678)
February 24, 1971 (H. 717)
March 1, 1971 (H. 721)
March 8, 1971 (H. 723)

Attached to each such report were the wiretap log entries for periods as noted in each report.

With the possible exception of the report for February 16, 1971, none of Mr. Updike's written reports complied with the Court's order that such reports show "the need for continued interception". The indication of that fact in the February 16, 1971 report was only in the form of Mr. Updike's statement that " . . . an application to extend the present authorization beyond its termination date of Febru-

ary 17, 1971, to March 13, 1971 is now being processed in Washington" (H. 678).

None of the written reports indicated to Judge Travia that there was a minimization problem. All of the reports assured him that "none of the calls included privileged communications." All of them included superficial and conclusory statistical summaries with regard to the submitted logs.

(*v*) *The Privileged Communication Requirement.* As noted, *supra,* each of the written reports assured Judge Travia that "none of the calls included privileged communications."

It appears that both Mr. Updike (H. 245) and Judge Travia (H. 432) are in agreement that it was orally indicated to him at the outset of the tapping operation that the calls of an attorney might be intercepted. Judge Travia recalls that he repeatedly admonished that the agents should not listen "to anything that might involve privileged communications" (H. 410; see also, H. 411). He assumed that the agents would point out to him any attorney-client call or call involving an attorney that might appear in any logs that were delivered to him; however:

> "Q. Did they volunteer to you at any point that a particular call involved an attorney? A. I don't think it took that tack at all. I don't recall that" (H. 432).

Judge Travia could not recall any situation where Updike or an agent pointed out a call on a log and said, "Here is a conversation which involved an attorney" (H. 434). He was never asked to determine whether any particular conversation was privileged (H. 435).

Judge Travia did not recall ever having been informed that an intercepted telephone conversation in fact involved a lawyer (H. 438). He concluded, based on Updike's reports, that no privileged communication had been intercepted. He assumed that he, himself, would resolve any legal issue concerning the possible existence of an attorney-client privileged call (H. 447).

C. The Execution of the Wiretaps

(*i*) *The Listening Post and Equipment.* The room in which the monitoring agents performed their task was called the listening post. Since the listening post was located two or three miles away from the premises at which the subject calls were located (H. 339), a telephone line was leased from the telephone company for the purpose of carrying the telephone conversations to the listening post (H. 151).

Whenever the receiver was lifted from the subject telephone and whenever an incoming call started the telephone ringing, a red light would illuminate in the listening post and automatic equipment would immediately start recording whatever was on the line. When the receiver was replaced, even momentarily, the red light would go out and the recording equipment would stop (H. 340, 347-8, 374-8, 469). On any outgoing call, a pen register recorded the number being dialed (H. 347-8, 374-6). As the tape on one recorder ran out, another recorder took its place so as to avoid any gap (H. 340, 377). As reels were filled with tape, the monitoring agents made complete duplicate copies of each reel on other recording machines.

(*ii*) *The Monitoring Agents.* Agent Francis J. Pryal testified as a witness in behalf of the government.[8]

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[8] At the hearing, the following stipulation was read into the record by the prosecutor:

> "It is stipulated by and between the government and the defendants through their counsel that each of the monitoring agents who performed such duties in connection with these authorized interceptions would testify in a manner similar to that of Inspector Pryal if called as a witness" (H. 485-486).

Pryal was one of a number of inspectors brought in from out of town to monitor the wiretaps. This was his first wiretap assignment (H. 346). His permanent station is in Washington, D.C. A day or so before the commencement of his duties with respect to monitoring the tap, the chief inspector told him in Washington, D.C., that he was coming to New York to man a wiretap, and "that there was a possibility of an integrity matter of one agent and he might be in some way involved with Mr. Bynum" (H. 338, 365).

When Pryal arrived in New York, he was supplied with a looseleaf packet which merely gave him the names of various individuals alleged to have been involved (H. 367). He and each of the other monitoring agents were on duty for five 12-hour shifts per week (60 hours) over the entire course of the wiretap operation (H. 340, 352, 396). Each tap had two men working on it at one time, so that when two taps were operating there would usually be four men in the listening post (H. 353).

The equipment was so set up that there was a set of earphones for each man on a team so that both members of the team would listen to the same conversation at the same time. Both men would make notes and then they might confer on what the log entry should be, although there were many times when there was no such conference (H. 353, 356). Neither man on a team was superior to the other (H. 362).

After typing the logs, symbols would be placed next to certain entries with a red pencil. The symbol "N" stood for the judgment that the call was possibly narcotics related. The symbol "IS" stood for the judgment that the call was possibly related to internal security. Although there are other marks on the logs, Pryal could not recall what they signified (H. 357-364).

During the course of the interception, he became familiar with the voices of many of the persons, including but not limited to Bynum, Donna (a teenage Baby sitter), Garnett, Mrs. Bynum, Cordovano and Wright (H. 470).

During the intervals between calls, Pryal would discuss the subject matter of the calls with his fellow agents (H. 475). Aside from the question of whether various calls were narcotics or crime related, they would, for example, joke about the baby sitter's calls with her boyfriends (H. 401-403), and mention that they had just been through a 30-minute gossip session (H. 475). He heard conversations which he would consider odd or ridiculous, but which he conceded the speaking parties would view differently (H. 476). Similarly, he conceded that he heard conversations with respect to the sex lives of the conversants (H. 476).

Pryal is not an attorney (H. 476). He was never introduced to Updike, the supervising attorney, during the course of his duties (H. 372).

(iii) *The Supervising Attorney.* Mr. Updike had a staff of six to eight lawyers under him, but it does not appear that any of them assisted or participated in the supervision of these wiretaps (H. 27). Prior to this case, he was never before in charge of an electronic surveillance operation (H. 168). The extent of his preparation for his task was that he had "generalized discussions" in the lunchroom with some of his colleagues;[9] he consulted the Justice Department manual; and he examined the wiretap statute (H. 163-164). He did no research (H. 165); he did not read the Congressional report with regard to the wiretap statute (H. 259); and he did not consult the Department

[9] Some of his colleagues gave him advice that total recordation of conversations might or would be in violation of the law (H. 163).

of Justice with a mind toward finding out what other prosecutors had done in his situation (H. 260).

(*iv*) *The Instructions to the Monitoring Agents.* At the outset of his direct examination by the Government at the hearing, Mr. Updike stated his instructions to the monitoring agents as follows:

> "And with respect to the actual operation of the intercept, my instructions were that they were to record everything except what any inspector felt was a privileged communication, and as to those they were to report to me when anything of that nature occurred or felt something of that nature occurred."
>
> "But the instructions were that they were to record and monitor at the start all communications that came over the telephone" (H. 33).

The fact of the matter was that Mr. Updike did not, himself, give instructions to the monitoring agents. Indeed, he did not meet with any of them before they commenced their duties, nor does he have a recollection of ever talking to any of them on the telephone. His only contact with the monitoring agents appears to have been when he briefly visited the listening post, and:

> "I actually borrowed the headset for, you know, two minutes or three minutes on a couple of occasions when I was over there, because I had never listened to a wiretap before and I thought I'd see what it was like" (H. 174; see also, H. 34, 160, 162).

At various points in his hearing testimony, Mr. Updike implied that the monitoring agents had had discretion with reference to what they ought listen to (H. 38-39, 168); however, he eventually conceded that the monitoring agents,

themselves, were never enlightened as to this alleged discretion.[10]

Mr. Updike's testimony conforms with that of Agent Pryal who testified that he never read the wiretap statute, nor did anyone ever discuss with him the concept of minimization (H. 392).[11]

According to Mr. Updike, the otherwise uncommunicated discretionary powers of the agents would be driven home to them solely by virtue of their sheer boredom:

> "Q. Then you were counting on the agents being bored and taking off their earphones as a vehicle

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[10] "* * * My instructions and my dealings were with Inspector Bitzer and Inspector Taylor and to the extent that the monitoring agents received any instructions they received them from them and not directly from me.

* * * * *

"Q. Well did you tell Inspector Taylor or Bitzer to use their own judgment in what instructions they ought to give to the monitoring agents? A. I didn't tell them that, but I certainly understood that within certain limits they would do that. They wanted to know what those limits were and I, in my instructions to them, gave them those limits.

"Q. And those were the limits to which you referred at the last hearing, to record everything unless they felt that they were dealing with a privileged communication? A. That's correct.

"Q. And if they felt that to contact you? A. That's correct.

"Q. And that was the sum total of the instructions that you gave those two inspectors to pass along to the monitoring agents? A. That's correct" (H. 266-267).

[11] "Q. Did you ever have any discussion with anyone concerning any limitations that were placed on you in your conduct of this surveillance? A. The instructions that we received were given by Mr. Taylor, maybe Mr. Bitzer, and the only limitation that I can recall was a privileged communication. We were not supposed to record any privileged communications.

* * * * *

"Q. Did anyone ever tell you that aside from the attorney calls, there were times when you should not listen in on conversations? A. No, sir" (H. 391-392).

by which the minimization objective of the statute would at least in part be accomplished? A. Yes, I think that is a fair characterization" (H. 170).

(v) *The Non-Coordination and Non-Communication of Information.* It is our submission that, in order to properly fulfill the minimization obligation, those on the front lines of the monitoring operation, as well as those charged with the supervision of that operation, should be aware of all current developments in the investigation. The record in this case demonstrates that both Mr. Updike and the monitoring agents were kept in a state of vincible ignorance with respect to the information necessary for the proper fulfillment of their respective functions.

We have the following from Mr. Updike:

(1) Although he was aware from the outset that two teams, totalling eight agents were on duty for visual surveillance on an around-the-clock basis with respect to this case (H. 45), he never looked at even one of the visual surveillance reports generated by these agents during the period beginning before and ending after the existence of these wiretaps (H. 113), although he knew that such reports existed (H. 216).

(2) Although there was a continual flow of information through the visual surveillance, the informants, and the wiretaps, he was aware that he did not receive the information from these various sources. The only clear cut direction that he gave with respect to information that he was to receive shortly after it was obtained was "potentially privileged communication" (H. 214-218).

(3) He did not receive the logs created by the monitoring agents until four or five days after the event, and he issued no instructions that he receive daily reports with respect to the wiretapping (H. 279). The fact of the

matter is that there were only three copies of the logs in existence: the original remained at the listening post; a carbon copy went either to Inspector Bitzer or Taylor who kept it at their own office in another building, and a xerox copy went to Judge Travia. There were no other copies and Mr. Updike never had a copy of his own (H. 183-185). It appears that, when the five-day time limit came around for the required letter-report, Inspector Taylor or Inspector Bitzer would come around with the statistics that were to be presented to Judge Travia and with *Judge Travia's copy* of the logs (H. 177-180). It was Judge Travia's copy that Updike perused. He conceded that he did not look at every page, nor did he make any notes on the copy nor did he make any independent notes (H. 186).

(4) Similarly, Mr. Updike made no effort to have the listening post located in a place which would be convenient to him (H. 148-153).[12]

It appears that he never examined the logs with a view towards ascertaining the relative evidentiary value of the information contained thereon. Toward the beginning of the investigation, his excuse was as follows:

> "* * * I did not at the time I first examined the logs go through them with a view to seeking out things of high evidentiary value, because as of that time it was our fervent hope with respect to this investigation, that we would be able to conclude it with a seizure of drugs at an appropriate time and place as part of a cutting operation at which virtually everyone in the conspiracy would be present or otherwise associated with it, and that was the game plan, as of that time" (H. 232).

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[12] The wiretaps were transmitted to the listening post via leased telephone lines.

His reason for not examining the logs carefully during the latter half of the investigation was as follows:

> "Before this case went to trial, there were very, very few conversations that fell into that category [high evidentiary value] because we had by that time machine guns and pistols and murder plots and chloroform and corroboration of various kinds of conspiracies that we had begun investigating with this wiretap, so I have not examined the logs with a view to that end that I have just described" (H. 230).

Similarly, the monitoring agents were kept in a state of ignorance. Aside from receiving a sheet of names at the beginning of the investigation, they received no other written document through to the point of the termination of the electronic surveillance, nor did they receive any briefing (H. 372).

(*vi*) *The Failure to Maintain Records.* Mr. Updike conceded that no record was made of: his visits to the listening post (H. 92); the visits of himself and the inspectors to Judge Travia (H. 102); his telephone conversations with the agents (H. 154-155), when he, himself, saw the logs (H. 176); who else may have seen the logs (H. 176); when the actual transcripts were created (H. 177); who had access to those transcripts (H. 177); and no notes were maintained with respect to his supervision of the electronic surveillance (H. 191).

Similarly, the government was not able to point to even one conversation that was not overheard *in toto* by the monitoring agents.

There is no indication that, during the course of this surveillance, anyone undertook to make a serious analysis of the products of the wiretap to determine whether a substantial number of telephone calls were being seized in violation of the minimization requirement (H. 87, 94, 103).

D. The Product of the Wiretapping

As noted *supra*, at p. 7, only eight of the intercepted telephone conversations were placed in evidence at the trial. The Court of Appeals noted that all of the telephone conversations which came over both tapped telephones were monitored *and* recorded (71a-72a). It found, however, that such a total invasion of privacy was unavoidable under the facts of this case (68a-73a). We submit that the uncontroverted statistics which were supplied to the District Court and specified to the Court of Appeals belie that conclusion.

In treating solely the *number* of conversations that were more than 2 minutes in length, the lower courts distorted the extent of the interceptions of irrelevant conversations. Begging the patience of this Court, we shall now demonstrate, as we did for the lower courts, that the gross amount of time involved in the lengthy calls far exceeded that involved in the shorter calls. In doing so, we shall utilize the even higher breakoff point of 3 minutes, thus giving to the government the more than 10% of the calls (280) which were between 2 and 3 minutes in length.

(*i*) *Number of Instances a Call was Made to or From One of the Tapped Telephones.* The first wiretap ("W" tap), including its extension, was operative for 34 days. The second wiretap ("Q" tap), which coincided with the last days of the "W" tap, was operative for 20 days.

The logs produced by the monitoring agents noted every instance in which a call was made to or from the telephones in question (H. 754 *et seq.*). As noted by the District Court, this included busy signals, wrong numbers, etc., as well as completed telephone communications (H. 1810).

The district court's figures (H. 1810), which were identical to our own (H. 1247), are as follows:

"W" tap calls of all types	— 2,604
"Q" tap calls of all types	— 832
Total calls of all types	— 3,436
Busy, etc.	— 1,378
Completed communications	2,058

(*ii*) *Completed Communications Broken Down According To Duration.* We provided the District Court with an exhaustive statistical analysis, on a call by call basis, noting the duration of the various completed telephone calls, as well as the parties to those calls (H. 1176-1270).

These statistics, which were used by the District Court, demonstrate that of the 2,058 completed communications, 501 were 3 minutes or more in duration (summarized at H. 1247; detailed at H. 1255 *et seq.*). Donna, the young teenage babysitter who cared for the Bynum-Garnett infant son after school, accounted for 144 calls, 73 of which ranged from 3 minutes to 30 minutes or more (H. 1250-3).

The telephones in question were located in the home of the petitioner Garnett. A review of all the calls reveals that she was a participant in a very large percentage of the conversations. In order to avoid the retrospective arguments that: a) Garnett was a conspirator and, therefore, warranted closer listening, and b) the agents needed a certain amount of time to react, the defense prepared a chart of her telephone conversations which *exceeded 10 minutes in length* and in which the other conversant was not named as a conspirator in the case (H. 1254). Neither the District Court nor the Court of Appeals adverts to this analysis in their opinions.

Objectively, and without regard to the content, there are two ways to view the gross number of completed telephone calls. The first is purely by reference to the number of distinct conversations held. The second is by reference to the amount of time which elapsed during these conversations. We did both.

Calls less than 3 Min.	1557 (76.5%)	31 hrs (30.5%)
Calls more than 3 Min.	501 (24.5%)	71 hrs (69.5%)
Total Calls:	2508 (100%)	102 hrs (100%)

The defense contended that the vast majority of calls which exceeded 3 minutes were absolutely irrelevant to the legitimate objectives of the wiretap operation. In order to avoid a quibbling contest, we singled out for the court's particular attention, the telephone conversations of the babysitter, Donna, and her teenage friends, as well as the telephone conversations of the defendant Garnett and her friends. As noted *supra*, we limited ourselves to Garnett calls which were 10 minutes or more in length and to which no other conspirator was a party. We ignored the numerous other lengthy innocuous calls. That computation revealed the following:

Category	*Number*	*Time* [13]
Donna Calls (3 min. +)	73	14-½ hrs.
Garnett Calls (10 min. +)	47	19 hrs.
	120	33-½ hrs.

Thus, utilizing this limited number of clearly innocent Donna and Garnett calls, we find that they account for *one*

[13] It must be understood that the time figures given here, are all taken from the statistics supplied to the District Court by the defense and have never been contested. They represent actual conversational time as recorded in the logs of the monitoring agents.

third of the total interception involved in all calls (102 hours, *supra*, p. 25) that passed over the two telephones during the entire period of the interception operation.

E. The Privileged Communications

By order of the District Court, many of the hearing exhibits were placed under seal and may be read only by the parties to this action and their attorneys. These include the wiretap logs, transcribed conversations and summarized conversations. Such exhibits were grouped in volumes 3 and 4 of the bound hearing proceedings (H. 754-1826) which were before the Court of Appeals and are being certified to this Court.

There are set forth at pp. H. 1549-1684, the transcribed versions of 67 telephone conversations to which attorneys [14] were parties. At H. 1546-1548, we advised the lower Court as to the specific 42 conversations which we considered to fall within the attorney-client privilege. Although we deem it inappropriate to discuss the content of such conversations in a public brief, we respectfully urge this Court to review that part of the record for the purpose of assessing the nature of the conversations involved.

The hearing established that Judge Travia was never advised of the fact that such conversations were seized. In his testimony, Mr. Updike admitted that, although he claimed to Judge Travia that no privileged conversations had been seized, he never told the Judge that this opinion was based on the fact that he (Updike), relied upon the *non-lawyer* agents to point such conversations out to him (H. 253).

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[14] None of the present attorneys for the Petitioners were in any way involved.

Reasons For Granting The Writ

Introduction

This Petition raises pressing and substantial questions of interpretation with regard to the Federal statutory scheme for court ordered electronic surveillance. Moreover, a number of the issues involved raise important questions under the search and seizure provisions of the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

In *Bynum I*, at 9a, the Court of Appeals described the problems presented in this case concerning the minimization of irrelevant interceptions, as follows:

> "It seems evident that we are faced here with weighty issues of first impression in this court which may well be raised again in other trial and appellate litigation."

Indeed, there can be no doubt that the Court has predicted accurately.

In *Bynum III* (137a), when confronted with the fact that a substantial portion of the wiretapping herein had been unlawfully authorized, the Court of Appeals, for the first time, introduced into the case the additional issues of harmless error and standing. This was so despite the fact that, of the eight wiretapped conversations introduced into evidence, four came from the illegal tap. Moreover, the Court ignored the fact that the hundreds of other conversations seized through that admittedly illegal tap were, according to the District Court and the prosecution, of substantial value to the investigation which led to the indictment herein. The Court of Appeals did not even deal with that issue, although these facts were shown and argued on the appeal and on the petition for rehearing.

It was only after many years of resistance that Congress was moved to permit the use of court-ordered electronic surveillance, and then only under the most stringent requirements. It is, perhaps, a natural tendency for law enforcement officers to press to the outer limits the strictures which have been placed upon them. Then, the outer limits become the norm and the press for wider limits becomes the new goal. The assurances given while attempting to induce the legislation are forgotten.

A narcotics conspiracy, particularly of the type alleged by the government in this case, presents a substantial and awful danger to the community. Law enforcement officers who seek to combat that danger by means of a wholesale violation of fundamental rights merely compound the evil effects of the underlying problem. Those who are willing to wink an eye at such lawless behavior encourage it and lay the groundwork for institutionalized and more pervasive oppression. A line must be drawn. We respectfully submit that those who were charged with the supervision and execution of the wiretaps in this case went far beyond that line. There is hardly a significant aspect of the legislative controls upon electronic surveillance which was not flouted.

Our Statement of the Case, *supra,* is unusually long and detailed. However, in the face of the substantial omissions in the opinions of the Court below, there is no other way for us to place before this Court the reality of what occurred here. While fictions are not unknown to the law, it would be improper to place the stamp of regularity upon the procedures followed herein.

I. The Wiretap Applications Failed To Establish Necessity For the Issuance of An Order.

If one message is sent by the governing wiretap statute, it is that a wiretap is a serious invasion of privacy which Congress was willing to tolerate only under the most

stringent conditions. One of those conditions is that a wiretap must be a last resort. Section 2518(1)(c) requires each application to include:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Subdivision (3)(c) of that same section requires the issuing judge, before permitting a wiretap, to make a finding that:

> "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

As noted *supra,* at p. 10, the wiretap applications contained the boilerplate allegation that "normal investigative procedures appear unlikely to succeed", but the assertation was contradicted by the plethora of successful investigative techniques then in use against the Petitioners. Moreover, the evidence at trial revealed that, on a number of occasions during the investigatory stage, agents were in possession of first hand information which would have enabled them to swoop down on Bynum's residence and catch him, with his confederates, in the act of packaging large amounts of narcotics. For reasons never revealed, they did not do so.

The Court of Appeals, in rejecting our arguments, said:

> It is further urged that applications for the wiretaps were defective in failing to establish that resort to this means of surveillance was necessary as required by 18 U.S.C. § 2518(1)(c). A reading of the detailed affidavits which were submitted in support of the wiretap and which form part of this record, indicating reason to believe that Bynum had engaged in the corruption of officials and violence

against informants, and that he was a long time narcotics violator, amply supports the issuance of the orders here made (*Bynum II*, at 66a-67a).

The Court's holding utterly ignores the statutory prerequisites. The issue is not whether Bynum was probably committing crimes, but rather whether other investigatory techniques would likely have been successful. The detail contained in the "detailed affidavits" established that very fact.

II. The Government Grossly Failed to Minimize The Interception of Irrelevant, Innocent Telephone Conversations.[15]

18 U.S.C. § 2518(5) provides, in pertinent part, as follows:

> "Every order *and extension thereof* shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." [emphasis added].

The opinions of the lower Court fail to mention that the agents who actually monitored the intercepts for five weeks were never told and did not know that there was such a thing as minimization (*supra*, pp. 18-19). They do not mention that the supervising attorney, who was supposed to be seeking to ". . . formulate . . . detailed screening instructions" (*Bynum II*, 70a). only glanced at the logs when he would file them every five days or so with the issuing

[15] *Supra*, at pp. 24-26, we set forth the facts which show that the overwhelming bulk of the interceptions, in terms of number and time, were irrelevant. *Supra*, at p. 26, we show that the agents indiscriminately intercepted privileged conversations.

magistrate (*supra*, pp. 20-22). It is no wonder that the attorney observed no pattern in the daily, lengthy and frequently personal conversation of a young girl with her friends. In his hearing testimony, while seeking to explain his decision to seize all conversations, he claimed, for example, that the interception of a conversation might later prove "useful" in counteracting an alibi that "could have been offered" at a subsequent trial (H. 111-2). Another theory offered by him was that he wished to preserve the calls, "so that there could be no accusation at a later time that the Government had made selective recordings in the conduct of this investigation * * *" (H. 167).

Of course, the nature of an electronic surveillance operation is such that innocent calls will, to some degree, be overheard. It is no doubt true, as well, that the nature of the crimes under investigation and the shrewdness of the individuals under investigation may decrease the ability of the monitoring agents to avoid interception of irrelevant conversations. However the magic incantations of "organized crime", "corruption", and "sophisticated targets" cannot legitimately be used to frustrate the Congressional intent.

It seems to us that an intelligent examination of the conduct of monitoring agents must commence with two inquiries: what was their expressed state of mind and how much of their time was, in fact, spent listening to irrelevant conversations? Here, we know that the agents had no thought of minimization; they didn't even know there was such a thing. The supervising attorney thought any conversation was properly subject to interception if it was "useful" in revealing the habits and whereabouts of the target, regardless of whether it was directly related to the investigation and regardless of whether the unwitting informant was an innocent third party. In response to the second question, we can indulge every reasonable presumption in favor of the government's decision, and still come

up with the fact that most of the total telephone time during the existence of these taps involved lengthy, innocent conversations.

Perhaps the most serious flaw in the Court of Appeals' analysis is the double standard in which it indulges in exercising "the acuity of hindsight" (*Bynum II*, at 72a). Thus, in the course of eventually absolving the agents for their extended interception of the babysitter's personal telephone calls, the Court states: "Of course, in making this retrospective judgment that Donna calls were innocent, we enjoy the acuity of hindsight".

On the other hand, hindsight of an incredible sort is utilized to indulge in findings adverse to the petitioners. Thus, in depicting the complexity of the operation which the wiretapping was meant to pierce, the Court states, "The conspiracy here unveiled was not limited to drug peddling, but included larceny, robbery and murder among its ingredients" (*Bynum II*, at 68a). The fact is, however, that none of the last included criminal ingredients was known at the institution of the taps. Indeed, the alleged murder plot did not come to light until late April of 1971, almost two months after the taps had terminated (*Bynum II*, 56a). That these factors would not, in any event, have entered into the selectivity of the monitoring agents is demonstrated by the fact that they were not briefed on the other developments in the case (*supra*, pp. 18-19, 20-22).

The second important, but erroneous, item of hindsight by the Court of Appeals is the alleged fact that Bynum knew that his phones were tapped, practically from the outset (*Bynum II*, at 69a). While it is true that Bynum testified at the trial that someone from the telephone company had told him his telephone was tapped, his knowledge in this regard cannot justify the government's actions, since this revelation came to light for the first time at the trial. Moreover, are we to conclude that a person's right

to privacy is diminished if he knows his phone is tapped or that the right to privacy of innocent third parties is similarly diminished?

Any resolution of the issue we raise here must be based, in large part, upon a recognition of the principles announced by this Court in *Berger* v. *New York*, 388 U.S. 41 (1967). There, the Court struck down, as violative of the Fourth Amendment, a New York eavesdrop statute. It did so on a number of grounds, one of which was that the statute permitted indiscriminate seizures of conversations having nothing to do with the criminal conduct under investigation. The Court stated, at page 59, that:

> The statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations.
>
> • • • • •
>
> During such a long and continuous (24 hour a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation.

The possibility of such an "indiscriminate" seizure of innocent conversations sank the statute.

With this issue in mind, Congress provided, in 18 U.S.C. § 2518(5), that:

> "Every order and extension thereof shall contain a provision that the authorization *to intercept* . . . shall be conducted in such a way as *to minimize the interception* of communications not otherwise subject to interception under this chapter . . ." [emphasis added].

This provision, the purpose of which is "to prevent improper invasion of the right of privacy provided by the Fourth Amendment and to curtail the indiscriminate seizure of communications",[16] is mandatory. As was noted in *United States* v. *Eastman,* 326 F. Supp. 1038, 1039 (M.D. Pa. 1971):

> "Such an invasion [of privacy] by law enforcement officers in the line of duty is to be tolerated only *in strict conformity* with the Constitution and applicable statutes" (emphasis added).

See also: *Application of United States,* 427 F.2d 639, 643 (9th Cir. 1970) ("If the Act is to survive a constitutional challenge, . . . it can only do so by giving the Act as limited a construction as is warranted by the language used.")

Directly in point are a number of cases. In *United States* v. *George,* 465 F.2d 772 (6th Cir. 1972), a provision in the wiretap order calculated to minimize the interception of conversations not otherwise subject to such interception was unknown to the executing agents, who therefore failed to comply with it. Instead, the agents "automatically" turned the recording machine on whenever a call was made to or from the phone being tapped—a fact identical to the facts of this case. The Sixth Circuit held as follows:

> "Thus, it is obvious that the evidence in this case obtained by electronic surveillance, allegedly pursuant to the statute, was obtained in a manner which violated the terms of the order authorizing the electronic surveillance. The motion to suppress could and should have been granted in accordance with the statute.

[16] See *United States* v. *Focarile,* 340 F. Supp. 1033, 1044 (D. Md. 1972).

> "We, therefore, hold that wiretap evidence secured without regard to the limitation set forth in the authorization order is inadmissible."

The conviction was therefore reversed, as this one should be.

Also in point is *United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971). There, the surveilling agents recorded every conversation which took place over the tapped wire.[17] Stating that "indiscriminate interception [of communications] by Government agents is an invasion of privacy not to be tolerated",[18] and that "the object of minimization is to prevent the wiretap from turning into the kind of general search and wholesale invasion of privacy decried by the Supreme Court in *Berger* . . . and *Katz* . . .",[19] the court held that the mandatory minimization requirements had not been met.

Here, of course, every call was recorded without the slightest gesture toward minimization of irrelevant calls. The comment of the court in *United States* v. *Focarile, supra* at 1046, is therefore in point:

> [T]here can be essentially two different types of violation of the minimization requirement of § 2518(5). The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of "innocent" calls. This first type of violation would obviously be a blatant violation of the provisions of Title III and, in addition, would probably violate the precepts of the Fourth Amendment.

We submit that it is beyond dispute that the wiretap surveillance in this case constituted a violation, as clear as it was gross, of both the statute and the order.

[17] The tap there was less intrusive than the one here. There, only forty-eight hours of conversation was intercepted; here, it was more than twice that.

[18] 335 F. Supp. at 543.

[19] 355 F. Supp. at 541.

III. If the Agents Did, in Fact, Minimize the Interception of Conversations to the Extent Possible, and if Their Efforts Represent a Good Faith and Sufficient Compliance with the Requirements of Title III, then the Wiretapping in this Case Constituted a General Search of the Type Prohibited by the Fourth Amendment of the United States Constitution.

As was indicated in *Berger* v. *New York*, 388 U.S. 41 (1967) and *Katz* v. *United States*, 389 U.S. 347 (1967), and as confirmed by *Kaiser* v. *New York*, 394 U.S. 280 (1969), the seizure of telephone conversations must conform to the requirements of the Fourth Amendment.

In *Berger*, this Court found that "few threats to liberty exist which are greater than that posed by the use of eavesdropping devices," 388 U.S. at 63, and declared that "the need for particularity and evidence of reliability . . . is especially great in the case of eavesdropping." 388 U.S. at 56. Where electronic surveillance is concerned, the Court has recognized a "heavier responsibility . . . in its supervision of the fairness of procedures than in any other area" *Osborn* v. *United States*, 385 U.S. 323, 329, fn. 7 (1966). Significantly, the opinion in *Berger* several times referred to *Stanford* v. *Texas*, 379 U.S. 476 (1965), a decision which imposed special Fourth Amendment requirements where the First Amendment is concerned. See 388 U.S. 41 at 53, 58.

Both the Government and the courts below placed a great deal of emphasis upon the nature of the crime charged in this case in order to justify the practically total seizure of conversations. It is claimed that, at any time, a conversation might turn to a topic of evidentiary value. Evidentiary value is not limited to the plans or description of a crime. It is aimed at finding out who a target's associates are, where he has been, where he is, where he will be, and where he is not. Any person who calls in or out is treated as a potential conspirator unless and until he is established to be otherwise. Every conspirator and potential conspirator has all of his conversations monitored and recorded *in*

toto because of his status as such. This is so notwithstanding the fact that only one person (Bynum) was named in the wiretap application and order. Even if it is concluded that a person using the phone is not a legitimate target of the tap, or that a conversation is not going to be of any evidentiary value, the conversations in question are nevertheless recorded and permanently preserved. All of this is performed under circumstances where the executing agents —the agents who manned the taps—were never told that there was an obligation to minimize.

It is beyond belief that this Court intended to allow lengthy surveillance of this type merely because the tap might pick up a lead. It seems clear from *Berger*, *Katz* and *Osborn*, that only short and highly discriminating intrusions will be tolerated. As was said in *Berger*, "we cannot forgive requirements of the Fourth Amendment in the name of law enforcement" (388 U.S. at 62).

In reversing a conviction in *Von Cleef* v. *New Jersey*, 395 U.S. 814 (1969), this Court held:

> "While [United States v.] Rabinowitz [339 U.S. 56] made the principles governing searches accompanying arrests unfortunately hazy, see Chimel v. California [395 U.S.] at 766, we have no hesitation in concluding that the action of the police here in combing a three story, sixteen room house from top to bottom, and carting away several thousand papers, publications, and other items cannot under any view of the Fourth Amendment be justified as 'incident to arrest'." (395 U.S. at 816).

If anything, the instrusions involved in *Von Cleef* pale in comparison to those of the present case.

We respectfully submit that the wiretapping herein was a clear violation of the reasonableness requirements of the Fourth Amendment.

IV. The Use of Conversations Derived from the Admittedly Illegal Extension Tap Was Not Harmless Error.

18 U.S.C. § 2515 mandates that evidence derived from an illegal wiretap cannot be utilized in any court proceeding:

> "§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.
>
> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication *and no evidence derived therefrom* may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." *Added* Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

In *Bynum III*, the Court of Appeals held that the defective authorization procedures rendered the "extension" wiretap illegal. Four conversations obtained by the illegal extension order were introduced into evidence at the trial. Nevertheless, the court held that the introduction of these conversations was harmless as to Garnett (who was the subscriber, but not a party to any of the conversations) as well as to Bynum and Cordovano (who were involved in all four).[20]

This Court's rulings on harmless error are clear, *see*, e.g., *Chapman* v. *California*, 386 U.S. 18 (1967), and the finding of the Court of Appeals clearly ignores the statutory and constitutional prerequisites to such a finding.

[20] Since, in *Bynum II*, which dealt with the minimization issue, no reference to harmless error was made, the finding of harmless error in *Bynum III* applies only to the product of the extension order.

An analysis of this case, as it has wended its way up and down the federal judicial system, discloses that a question of the utmost importance is involved. That question is whether the Government shall be tolerated to make different factual assertions at different times, depending on the issue it must then meet, and to cover up the indefensible by the camouflage of a claim of harmless error. The Court of Appeals sustained that delayed claim without reference to the investigatory use of the many conversations seized by the extension tap. Moreover, the Court ignored the extent to which the Government relied upon the four conversations in order to corroborate the testimony of its indispensible witness, Stewart.

A very brief recitation of the Government's bizarre changes of position will set up the backdrop for our argument.

In *Bynum I*, petitioners argued that the Government had failed to minimize its interception of non-pertinent communications. The Government responded that petitioners were unable to point "to a single conversation improperly overheard" (Government Brief in *Bynum I*, p. 25), even though every conversation had been monitored, and asserted that the overhearing of a non-pertinent conversation was, at most, an "occasional" event (Id., p. 26). Thus, faced with a minimization argument, the Government asserted that virtually every conversation (all of which were intercepted) was important to its investigation. No claim of harmless error was made or even hinted. The Court of Appeals, faced with an incomplete record, ordered a hearing on this issue.

At the hearing ordered in *Bynum I*, the Government believed it had to show that no real minimization was

possible, since virtually every conversation had evidentiary value. In support of that thesis, the Assistant United States Attorney who had supervised the wiretap, swore as follows:

> 1. That "even calls that relate[d] to where Mr. Bynum would be at a certain time or where someone with whom he was associated would be at a certain time, those calls were frequently followed up by the use of surveillance teams,[21] and it is precisely on the basis of that kind of a call that surveillances were conducted" (H43-44); and
>
> 2. That conversations engaged in by a teenaged baby-sitter, Donna, were valuable to the investigation because she sometimes took messages for Bynum and Garnett which "provided significant leads" and because even when talking with her teenage friends,[22] she would sometimes describe Bynum's activities, which "provided useful leads and useful information"—"leads that could be followed by the surveillance agents . . . ." (H32); and
>
> 3. That intercepted conversations would show the location of the callers, and that this was "useful as a check on surveillance information or [to] supply information to surveillance teams. It is the kind of information that can be, although of its nature basically innocent information, *it can be of extreme evidentiary value* . . . " (H111) (emphasis added); and
>
> 4. That even information, gleaned from the wiretapped conversations of others, showing Bynum was not at home was of some potential value; and, astoundingly
>
> 5. That even when nothing was learned from an intercepted conversation, the interception was valuable to the investigation in the sense that the investigators had learned that nothing was learned (H219-20).

[21] There was a two-way radio system between the wiretap monitoring post and teams of surveillance agents (H395).

[22] A portion of Donna's chatter with her peers dealt with the sexual activities of themselves and their friends. The recording machine, oblivious to the privacy of such conversations, memorialized every word.

In light of this type of testimony, it should come as no surprise that the Government claimed that it had intercepted 1,767 calls of "evidentiary value" to its investigation (H103), and raised no claim of harmless error.[23]

The District Court, in its opinion on the minimization issue, made clear that the intercepted conversations were of substantial value to the Government:

> "Moreover, no criticism can validly be leveled at any of the intercepted conversations which were transcribed by the Government—the inculpatory nature of these with picayune exceptions *is patent*." (14a, fn. 3) (emphasis added)

In *Bynum I* and *Bynum II,* Petitioners argued that the wiretapping herein had not been necessary, and claimed that the evidence indicated that the Government had a chart, which identified all of the alleged members of the conspiracy, even before the wiretapping commenced. The Government responded as follows:

[23] A total of 3,436 calls were intercepted (H1467), but this figure is somewhat deceptive, since it includes busy signals and, predictably, calls to the weather bureau, each of which was meticulously, if not religiously, monitored by the agents in their court-ordered effort to minimize the interception of non-pertinent conversations.

> "Defendant's arguments that 'this chart' was part of 'the original application' (H78) ignores the very pages cited (See H78 and 445) *and is utterly false.* The chronological reports (GX-21 at H1065-1174, H510-512, 597) make abundantly clear the processes of identifying nearly everyone on the chart, and this identification process *was substantially based on information obtained from the wiretap.* (Government's Supplemental Brief—*Bynum II*, at p. 19, fn.) [emphasis added]

Consistent with its earlier position, the Government argued in its *Bynum II* brief, for example, that "Indeed, *even when talking to her friends*, Donna related valuable information concerning the drug business" (p. 23). It argued, in fact, that "85% of the conversations recorded were relevant to the authorized investigation" (71a).

The Court of Appeals, again making no reference, as it might have, to harmless error, affirmed the convictions, and held that the Government had complied with the minimization requirements.

Petitioners then sought the aid of this Court, not only on the minimization issue but upon others, including a claim that the authorization for the extension order had been fatally defective.[24] In response, the Government argued that it had "complied with all [minimization] requirements."[25] No claim of harmless error was even whispered to this Court.

It was only after this Court vacated the judgments herein, and the case eventually returned to the District Court for a hearing on the authorization issue, that the

[24] See the petition for a writ of certiorari in No. 73-856 October Term, 1973.

[25] Government's Brief in Opposition, page 9.

Government started to claim "harmless error", as though *Chapman, supra*, had just been decided. Nonetheless, the District Court did not decide that issue, but instead ruled that there had been a proper authorization of the extension order (see 111a-136a). This ruling set the stage for *Bynum III*.

In its brief in *Bynum III*, the Government pressed its newly-imagined harmless error argument and the Court of Appeals accepted it. Thus, the wiretaps which had been so essential through investigation, trial and prior appeals were suddenly held to be superfluous.

A finding of harmless error is, we submit, a prize for which the Government never before strove and to which it is not factually entitled. In addition to the Government's argument that the wiretaps were essential in its investigation, we present evidence as to how useful it was at trial in securing the convictions of all the Petitioners. Not only did the Government introduce eight of the intercepted conversations in evidence against all Petitioners at their trial, but, on summation:

1. Actually replayed four of those taped conversations to the jury (A2663, 2664, 2667, 2668);[26] and

2. Referred to one conversation between Bynum and Cordovano as a description of the state of the drug market in New York City (A2660); and

3. Referred to other conversations as corroboration of Stewart's testimony (A2661); and

4. Argued, after playing the tapes to the jury, that: "when you hear Mr. Cordovano's voice and you hear Bynum's voice, that's not Stewart's testimony. It's their voices, and if you can figure out

[26] The conversations were between Bynum and Cordovano.

another explanation for what's going on there, then you should acquit these defendants" (A2671).[27]

Finally, in its charge, the trial court directed the jury's attention to the Government's claim that Stewart's testimony had been corroborated by the taps (A 2715).

When one considers the use to which the wiretaps were put at trial and during the investigation which preceded the trial, a claim that the error involved in the issuance of the wiretap order was harmless is nothing more than a smoke screen to hide that error and to save the conviction.

V. The Court of Appeals Has Held That Petitioners Bynum, Cordovano and Garnett Have Standing to Contest the Legality of All of the Wiretaps. The Court Erroneously Held that the Remaining Petitioners Lacked Standing.

In *Bynum I*, the Court of Appeals held that Petitioners Bynum and Garnett were "aggrieved persons" within the meaning of 18 U.S.C. § 2510(11) and thus had standing to contest the legality of the wiretap; it remanded for a hearing as to all Petitioners, however, since it believed that a reversal as to Bynum "might well render the convictions of the lesser figures in the scheme vulnerable and entitle them all to new trials" (7a-8a). In *Bynum II*, where, as here, all Petitioners raised the wiretap issue, no reference was made to the standing issue. In *Bynum III*, however, after holding that the extension tap was illegal, the court held that only Bynum, Cordovano and Garnett could raise the issue—the others had

[27] At the hearing, held pursuant to the order in *Bynum I*, the same Government counsel conceded that certain calls had "in fact corroborated the testimony of the Government's principal witness, George Stewart" (H112).

neither participated in the "extension" calls *introduced into evidence* nor did they have an interest in the premises where the tap was located. Thus, held the court, they were not "aggrieved persons" and had no standing to challenge the wiretap.

This petition presents to this Court, for the first time, important questions concerning the issue of standing to contest the legality of eavesdropping under 18 U.S.C. § 2510 *et seq.*

The standing test is set forth in 18 U.S.C. § 2510(11), which defines "aggrieved person" as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." This definition has two parts, and the Court of Appeals implicitly dealt with each. In so doing, it so narrowly confined each as to fly in the face of the words themselves and to deny standing to those clearly entitled to it.

(a) "A person who was a party to any intercepted . . . communication"

The court below denied standing to all but three of the Petitioners herein partly on the ground that none of those it excluded had participated in any of the four "extension" conversations *which the Government introduced into evidence* at trial (139a). We submit that in doing so it clearly erred in a way which would permit the Government, in its sole discretion, to determine who has standing, and would deny standing to numerous persons entitled to it.

The statute gives standing to any person who was a party to *"any intercepted . . . communication."* Here, numerous of the Petitioners to whom the Court of Appeals denied standing had in fact been a party to communica-

tions intercepted by virtue of the extension order.[28] On the reasoning of the court below, these parties to intercepted conversations are to be denied the standing clearly given to them by the statute merely because the Government chose not to offer their intercepted conversations into evidence at trial. By that same reasoning, the Government could illegally tap a number of people, use the fruits of that tap in building a case which could not otherwise have been built and then avoid condemnation of their conduct by introducing against those whose privacy had been thus violated only the fruits of the taps (e.g., surveillances) rather than the intercepted conversations themselves.[29] The very words used by Congress in defining "aggrieved person" shows that no such result was intended. But that is the effect of the ruling of the court below.

(b) "A person against whom the interception was directed"

The meaning of the second branch of the definition of "aggrieved person" is also involved in this petition. It clearly includes persons who were not parties to any intercepted communication, but this Court has yet to determine, in a factual setting such as this, the status of the persons included within its terms.

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[28] A list of the parties to each call on both wiretaps will be found at H1332-1466. That list, prepared by the Government, shows at the very least that the following petitioners were parties to conversations picked up by the "extension" tap: Small (e.g., Calls W1620, W1776, W2012, W2136 and W2471); Wright (e.g., Calls W1621, W2009, W2077, W2278, W2279, W2417, W2465, W2478 and W2479); Dyson (e.g., Calls W1628, W1665, W1787, W2166, W2177, W2178, W2434, W2510 and W2547); Nedd (e.g., Call W2220); and Birnbaum (e.g., Calls W2597, W2600, W2601 and W2602).

[29] As we point out *supra*, with regard to the harmless error issue, that is precisely what happened here, since Petitioners were denied a hearing as to how the Government may have used against them the fruits of the intercepted conversations which were not actually offered into evidence.

Here, the original wiretap application and the application for the extension order alleged that Bynum was involved in a conspiracy with persons "as yet unknown" (A59, 83), and one of the purposes of the requested interception was to ascertain the identity of those "as yet unknown" persons (A62, 87). The Government is already on record to the effect that the wiretaps were "indispensible in identifying additional members of the conspiracy."[30] Those Petitioners who were denied standing by the Court of Appeals are clearly those whose identities were discovered by the wiretaps. And we do not have a case here where their discovery was accidental—it was one of the very purposes of the tap. Though nameless at the time, we submit that they were clearly persons at whom the interception was directed. In any event, since the issue will no doubt recur, this Court should resolve the issue of whether persons similarly situated have standing to contest the legality of the wiretap without which they could not have been charged.

In short, we submit that no constitutional provision, however noble, is worth much to a person who is forbidden to resort to it. The parsimonious interpretation of "aggrieved person" espoused by the Court of Appeals flies in the face of Congressional intent and denies important constitutional protections to those entitled to them. Moreover, it allows the Government's trial strategy, rather than the facts, to determine who has standing to challenge illegal conduct. It should be reviewed and interred by this Court.

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[30] See the statement to this effect in the Government's Brief in Opposition to our first petition for a writ of certiorari (No. 73-856, October Term, 1973), at page 7, n. 4.

CONCLUSION

For all of the above noted reasons, the Petition for a Writ of Certiorari should be granted; the judgments of conviction should be reserved, and a new trial should be granted.

Respectfully submitted,

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